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No. 90-1324

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA, ET AL., PETITIONERS

v.

CY JAMISON, DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

GEORGE VAN CLEVE
Acting Assistant Attorney General

ANNE S. ALMY
JOHN A. BRYSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS L. SANSONETTI
Solicitor

RICHARD J. WOODCOCK
Attorney
Department of the Interior
Washington, D.C. 20240

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QUESTION PRESENTED

Whether the State of Nevada's complaint sufficiently alleged its standing to challenge the grant of a right-of-way by the Bureau of Land Management to the Department of Energy pursuant to Section 507 of the Federal Land Policy and Management Act, 43 U.S.C. 1767.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-10, is reported at 918 F.2d 854. The opinion of the district court, Pet. App. 11-53, is reported at 708 F. Supp. 289.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

On March 24, 1988, the State of Nevada filed this action against officers of the Bureau of Land Management challenging the grant of a right-of-way pursuant to the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.* This authorization to use public lands of the United States in Nevada was given to the Department of Energy so that it could carry out its duty under the Nuclear Waste Policy Act of 1982 to conduct site characterization activities at Yucca Mountain. See 42 U.S.C. 10101 *et seq.* The purpose of this program is to assess the suitability of the site as a repository for high-level nuclear waste. The district court dismissed the action for failure to allege standing, and the court of appeals affirmed.

1. Under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.*, the Bureau of Land Management (BLM), enjoys broad authority to manage the public lands. The generally applicable principle is that the land shall be managed "on the basis of multiple use," which is defined as "making the most judicious use of the land for some or all of these resources," including where appropriate, allowing persons "the use of some land for less than all of the resources." 43 U.S.C. 1701(a)(7), 1702(c).[1]

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[1] Prior to the enactment of the Federal Land Policy and Management Act, the Bureau of Land Management generally administered the public lands on a multiple use basis pursuant to the superseded Classification and Multiple Use Act of 1964, 43 U.S.C. 1411 (1976), and the Taylor Grazing Act, 43 U.S.C. 315a *et seq.* Under the authority of the Classification and Multiple Use Act, BLM surveyed the public land under its management in the western United States, classifying tracts for retention under multiple use or for disposal. Under Section 701(c) of the Federal Land Policy and Management Act,

The statute authorizes the Secretary of the Interior to "permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way," withdrawals, and cooperative agreements. 43 U.S.C. 1732(b). Pursuant to Section 507, "[t]he Secretary * * * may provide under applicable provisions of this [title] for the use of any department or agency of the United States a right-of-way over, upon, under or through the land administered by him, subject to such terms and conditions as he may impose." 43 U.S.C. 1767(a). Section 501(a) authorizes rights-of-way for a number of specific uses of public lands, as well as "other systems or facilities which are in the public interest." 43 U.S.C. 1761(a)(1)-(7).

The Secretary is also authorized to order withdrawals with respect to any federal lands. 43 U.S.C. 1714(a). A "withdrawal" means "withholding an area of the Federal land from settlement, sale, location or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. 1702(j). If the Secretary orders a withdrawal of a parcel of 5,000 or more acres, he must prepare a report for Congress that addresses a variety of factors relating to the withdrawal. 43 U.S.C. 1714(c). In addition, before withdrawing any tract, the Secretary must afford an opportunity for the public to be heard. 43 U.S.C. 1714(h).

2. The Department of Energy, which is *not* a party to this case, is charged with implementing the

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all of these classifications remain in effect until modified under the procedures of the new statute. 43 U.S.C. 1701 note.

Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10101 *et seq.* In that statute, Congress has directed the Department of Energy to conduct a multi-year intensive investigation of the Yucca Mountain site, located on public lands in the State of Nevada, for possible use as a repository for high-level nuclear waste. 42 U.S.C. 10133(a). The Department of Energy plans to excavate an exploratory shaft to the proposed depth of the repository horizon and conduct a variety of scientific investigations of the site's geologic, hydrologic, and other geotechnical characteristics. This project will take several years. No radioactive waste, however, will be brought to the site during site characterization.

Following site characterization, the Secretary of Energy, if he finds Yucca Mountain to be a suitable site, may recommend to the President that the site be developed as a repository. 42 U.S.C. 10134(a)(1). The Secretary must prepare a comprehensive statement of the basis for such recommendation, together with an environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 *et seq.* The State may then submit a notice of disapproval to Congress, which can override that disapproval by passage of a resolution that "becomes law." 42 U.S.C. 10135(b), 10135(c), 10136(b). If the recommendation to develop the site becomes effective, the Secretary of Energy must then obtain a license from the Nuclear Regulatory Commission to construct and operate a repository. 42 U.S.C. 10134(b) and (d).

3. In order to carry out site characterization on a portion of this site, the Department of Energy applied to BLM for a right-of-way to occupy, use, and undertake site characterization activities over some 51,789 acres of public lands near Yucca Mountain.

Pet. App. 64. BLM administers this area under FLPMA pursuant to a multiple use, retention, classification order issued under the now expired Classification and Multiple Use Act of 1964. Pet. App. 69. In processing the application, BLM reviewed and adopted the Department of Energy's Environmental Assessment for Yucca Mountain, prepared pursuant to 42 U.S.C. 10132(b)(1)(E). Pet. App. 72. The Attorney General of Nevada opposed the issuance of the right-of-way, but on January 6, 1988, BLM rejected these objections and issued the right-of-way. *Id.* at 64-65.

4. The first count of the State's complaint against BLM charged that the issuance of the right-of-way violated several statutory provisions. In particular, the complaint alleged (1) that the right-of-way was inconsistent with FLPMA's direction to manage this land for multiple use because the Department of Energy is authorized to undertake activities that are inconsistent with valid, existing uses and that will extensively disrupt the land; (2) that the issuance of the right-of-way was a *de facto* withdrawal issued in violation of FLPMA; and (3) that BLM had not faithfully discharged its duties under NEPA. Pet. App. 66-74. In the second cause of action, the State sought to compel approval of the application of one of its contractors for a similar right-of-way. *Id.* at 74-75.[2] In the third and fourth causes of action, the State alleged that BLM was engaged in a conspiracy with the Department of Energy to violate the Tenth Amendment and the rights of Nevada under the Equal Footing Doctrine, and that there was no con-

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[2] This claim was dismissed as unripe, Pet. App. 45-47, and no appeal was taken from this disposition.

stitutional basis for the grant of the right-of-way. *Id.* at 76-78.

The defendants moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the entire action for lack of jurisdiction because of the failure to establish standing and, in the alternative, under Rule 12(b)(6) to dismiss the third and fourth causes of action for failure to state a claim. After considering briefs from the parties, the district court granted the motion, dismissing the complaint on January 30, 1989. Pet. App. 11-54.

5. The district court concluded that the State had not alleged facts in its complaint that establish its standing. Pet. App. 29-33. The court noted that the complaint contained no averment of any proprietary or sovereign interest in the public lands in the vicinity of the Yucca Mountain site. *Id.* at 32. Nor did the complaint allege that the State used any of those lands. *Id.* at 31. Consequently, the complaint merely sought to vindicate the State's desire to see that the agency follows the requirements of law, an interest that is not sufficient to establish standing. *Id.* at 34.

The court did note that the State, in response to the motion to dismiss, contended that it and its citizens would be adversely affected in a variety of ways if a nuclear waste repository was actually developed at Yucca Mountain. Pet. App. 32-33. The court concluded, however, that the final decision on whether to use this site for a repository was several years away, and therefore, the potential harm was not of sufficient immediacy to establish an injury under Article III. Pet. App. 33, 36-38.

The court also held that standing could not be based on the State's rights under the Nuclear Waste

Policy Act to participate in the site selection process conducted by the Department of Energy. Pet. App. 38-45. The court concluded that nothing that BLM had done had any effect on the State's ability to exercise its rights under the Nuclear Waste Policy Act. Pet. App. 44-45.[3]

6. The court of appeals affirmed. The court first noted that the State's complaint, while alleging various statutory and constitutional violations, completely omitted any explanation of injury to Nevada. Pet. App. 7. This failure reduced the complaint to a grievance that BLM was not following the requirements of law, an insufficient basis to establish standing.

Second, the court rejected as "mere speculation" the claim that BLM's grant of a right-of-way impinged on the State's political and sovereign right to object to the siting of a repository within the State. Pet. App. 8. Because the decision to develop Yucca Mountain as a repository is "many years and numerous procedural hurdles away," and none of those steps is linked to BLM's actions, the issuance of the right-of-way inflicted no concrete harm on Nevada's sovereign interests. *Ibid.*

Third, the court concluded that Nevada had not shown how any of its proprietary interests had been affected by the grant of the right-of-way. Therefore, the State alleged no injury in its capacity as a proprietor sufficient to confer standing. Pet. App. 9.

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[3] The court also ruled, in the alternative, that Nevada's third and fourth causes of action failed to state a claim. Pet. App. 47-53. The court noted that challenges to the constitutionality of the 1987 Amendments to the Nuclear Waste Policy Act and to the adequacy of the Department of Energy's Environmental Assessment are within the exclusive jurisdiction of the appropriate court of appeals, rather than the district court. Pet. App. 53 n.14; see 42 U.S.C. 10139(a)(1)(C) and (E).

Finally, the court rejected the claim of *parens patriae* standing. Not only had the State failed to plead any injury to its quasi-sovereign interests, but the court of appeals also concluded the State could not assert such interests against the federal government, citing *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. 592, 607 n.14 (1982). Pet. App. 9.

ARGUMENT

The court of appeals held that Nevada lacks standing under Article III because the State's complaint fails to allege any concrete injury to the State's interests as sovereign, as proprietor, or as *parens patriae*. That decision, which rests on well-established standing principles, is correct. Furthermore, it does not conflict with any decision of this Court or of any other court of appeals.

To satisfy Article III, a person seeking to invoke the judicial power must show that he has personally suffered or is in immediate danger of sustaining a direct injury as a result of the allegedly illegal conduct. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974); *Laird* v. *Tatum*, 408 U.S. 1, 12-13 (1972). Here, the State must show first that it has suffered an "injury in fact" that is palpable, concrete, and immediate, and not merely abstract, conjectural, or hypothetical. *Allen* v. *Wright*, 468 U.S. at 751; see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Second, the State must establish a sufficient causal link between the asserted

injury and the allegedly illegal conduct of the defendant, BLM. The causation requirement has two elements: (1) the alleged injury must be fairly traceable to the conduct challenged as unlawful, and (2) the alleged injury must be likely to be redressed by the requested relief. *Allen* v. *Wright*, 468 U.S. at 753.[4]

Nevada's complaint alleges that BLM issued the right-of-way in violation of the requirements of FLPMA, NEPA, and limitations imposed by the Tenth Amendment and the Equal Footing Doctrine. Pet. App. 67-74, 76-78. It further asserts that the BLM's action would injure the State in three capacities: (1) as sovereign, (2) as proprietor, and (3) as *parens patriae*. *Id.* at 61-62.

1. The sovereign interest at stake is Nevada's claimed right to veto, for whatever reasons it chooses, the investigation of public lands for use as a potential repository for nuclear waste.[5] Although the com-

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[4] The fact that the plaintiff is a State does not permit the relaxation of any of these requirements for pleading or proving standing. *Florida* v. *Mellon*, 273 U.S. 12, 16-17 (1927).

[5] Thus, the complaint refers to "Nevada's political right to object to its selection as the host for a repository," Pet. App. 76, to allegations of violations of "Nevada's equal footing and Tenth Amendment rights," Pet. App. 77, to an alleged "infringement upon an unconsenting state's sovereignty," *id.* at 78, and to the State's objection that any authorization to use public land for site characterization requires the "Nevada Legislature's consent as required by * * * Article I, Section 8, Clause 17 [the Federal Enclave Clause]." *Id.* at 67.

The State also asserts in its petition, Pet. 24-26, but not in its complaint, that the actions of BLM injured the economic and environmental well-being of its citizens. But these are allegations of injury to the State's quasi-sovereign interests, not its sovereign interests. *Alfred L. Snapp & Son* v. *Puerto*

plaint implies that the Nuclear Waste Policy Act and its amendments—under which the Department of Energy is required to characterize Yucca Mountain for use as a potential repository and under which the Department of Energy might develop a repository at Yucca Mountain, Pet. App. 62-63—are contrary to the State's claimed sovereign right to refuse consent for the project, such harm cannot fairly be traced to the actions of the defendant in this case. BLM had nothing to do with the passage of the NWPA or the 1987 Amendments, and is not responsible for the NWPA's administration. All that BLM has done is to authorize the Department of Energy to occupy and use the public lands for the purposes of site characterization. This action was taken *not* pursuant to any provision of the Nuclear Waste Policy Act, but in the exercise of BLM's general responsibilities under a preexisting statute, the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.*[6]

Rico, 458 U.S. at 601-602; see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 n.33 (1981) (possible detrimental impact of the economy of a state does not give rise to a violation of the Tenth Amendment's guarantee of state sovereignty); *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941) (same); *United States* v. *Texas*, 339 U.S. 707, 716 (1950) (Equal Footing Doctrine protects the states' political rights and sovereignty, not their economic stature or standing). Quasi-sovereign interests may be asserted by the State only in its capacity as *parens patriae*, and the sufficiency of the complaint with respect to this basis for standing is discussed at Point 3, *infra*.

[6] The Nuclear Waste Policy Act does contain a provision, applicable to BLM, that requires other agencies to expedite the Department of Energy's applications for permits, but only "to the extent permitted by the applicable provisions of law administered by such agency." 42 U.S.C. 10140(a)(1). The provision further states that the permit shall "include such

It is true that, if the Department of Energy did not have the right-of-way granted by BLM, the Department of Energy could not implement the statutorily mandated program of site characterization. It therefore would be unable to complete the process by which the alleged sovereign injury—imposition of a repository contrary to the State's wishes—could possibly be inflicted. But the fact remains that the action of BLM is not the proximate cause of the State's alleged injury. As the court of appeals put it, "the only '*direct* consequence [of the BLM action] is that the site characterization process will proceed to the next step in accordance with the [Nuclear Waste Policy Act].'" Pet. App. 8 (quoting Pet. App. 37 (emphasis added)). The connection between the alleged injury to the State's sovereignty and the conduct of BLM is simply too attenuated to permit the invocation of the judicial power under Article III. See *Allen* v. *Wright*, 468 U.S. at 753; *Secretary of Interior* v. *California*, 464 U.S. 312, 342-343 (1984); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Moreover, as the court of appeals concluded, the infliction of this injury is entirely speculative. The State's assumption that a decision has been made to use Yucca Mountain as a repository site is not grounded in the facts. BLM's action does not authorize the use of the property as a repository site. The only body to speak to that subject has been Congress, when it enacted the 1987 Amendments, and,

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terms and conditions as may be required by law, and may include terms and conditions permitted by law." 42 U.S.C. 10140(a)(2) and (b). Thus, when BLM processed the Department of Energy's request for a right-of-way, it acted solely under its own statute, the Federal Land Policy and Management Act.

even then, the use of Yucca Mountain as a repository site is conditioned on several major future contingencies. Any putative injury to the State's sovereignty is simply not attributable to the only defendant named in this case, BLM, and therefore there is no standing to assert such claims against that agency. See *Allen* v. *Wright*, 468 U.S. at 753.

Finally, Nevada acknowledges, Pet. 17, 38, that the State has received a full hearing on all of its claims against the constitutionality of the NWPA, which form the basis of alleged infringement of sovereignty, in its case brought directly against the Department of Energy, the agency that is implementing the NWPA. *Nevada* v. *Watkins*, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 111 S. Ct. 1105 (1991). Now that the judgment in that case has become final, the State is estopped from litigating those claims again. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1971). Accordingly, there is no purpose in reviewing a determination that the State had not pled its standing to raise them in an action against BLM.

2. The second capacity in which the State brought this action is as a proprietor. Pet. App. 62. Although a state may sue to redress injuries to its proprietary interests, such as the interests that arise from owning property,[7] the complaint in this case is devoid of any identification of any of the State's proprietary interests, much less an allegation of how those interests may have been injured by the action of BLM. The affected area is owned by the United States, not Nevada. The court of appeals correctly noted that "Nevada does not own the affected prop-

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[7] See *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 601-602; *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 671 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976).

erty, nor has it alleged that it uses the property for any purpose." Pet. App. 9.

3. The State also alleged that it brought this action in its capacity as the *parens patriae*. Under this doctrine, a State may have standing to assert "quasi-sovereign" interests,[8] which fall into two general categories: (1) "the health and well-being—both physical and economic—of its residents in general," and (2) inclusion in "the benefits that are to flow from participation in the federal system." *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 607-608. The latter interest does not concern questions of the relationship between the States and the Federal government, which would involve the State's sovereign interests. Rather, it pertains to a State's interest in securing for its citizens the advantages of the federal system, such as freedom from discrimination in interstate commerce or securing the benefits created by a federal statute. *Ibid.*

a. But even when a State may assert such quasi-sovereign interests, the complaint still must satisfy the core requirement of Article III: identification of the nature of the interests it seeks to represent and factual allegations of a direct and immediate injury to those interests. *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 602 (quasi-sovereign interests must not be "too vague" because they must "survive the standing requirement of Article III: a quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant"); see *Massachusetts* v. *Mellon*, 262 U.S. 447, 480-482 (1923); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985);

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[8] See *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. at 602-609; *Pennsylvania* v. *Kleppe*, 533 F.2d at 673-675.

Carey v. *Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980).

The court of appeals correctly concluded that the complaint here is "silent as to how these alleged [statutory and constitutional] violations have resulted in injury to Nevada." Pet. App. 7. Therefore, this basis for standing must fail as well. To make up for this defect, the State relies on a variety of materials submitted to the court of appeals that discuss the threats it perceives to the public health and safety, to the environment, and to the economy of the State. Pet. 24-26. Reliance on these materials is not a satisfactory substitute for a properly pled complaint. These materials are not only outside the complaint, but were never made part of the record in the district court.

Nor can the liberal standards of notice pleading be stretched this far to excuse Nevada's failure properly to plead the requisite injury. In *Conley* v. *Gibson*, 355 U.S. 41 (1957), relied on by the State, the complaint described the plaintiffs' status as employees covered by the Railway Labor Act and the defendants' status as plaintiffs' bargaining agent, and further alleged that in the administration of a labor agreement the union had permitted them to be discharged because of their race in violation of the statute. 355 U.S. at 42-43. In *United States* v. *SCRAP*, 412 U.S. 669 (1973), the complaint described the alleged injury as the increased adverse environmental impacts on the air and other natural resources enjoyed by plaintiffs that were alleged to be caused by increases in freight rates set by the Interstate Commerce Commission. 412 U.S. at 678. Similarly, in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), the complaint alleged the plaintiffs were "residents of the City of Richmond or Henrico

County" and were deprived, by defendants' violation of the Fair Housing Act, of the "right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." 455 U.S. at 376. Nevada's complaint in this case, in contrast, contains nothing that even purports to describe injury to its quasi-sovereign interests. The most the State can point to in the complaint is the allegation that the other states have solved the nuclear waste problem "*at the expense* of Nevada." Pet. 22; Pet. App. 77 (emphasis added). This reference is simply too vague to allege any injury establishing standing.

Even if it were appropriate to accept these extra-record materials, the allegations do not describe an actual or threatened injury to the State's quasi-sovereign interests that can be traced to the conduct of the defendant. The State relies on a projection of harms that flow from the construction and operation of a repository at Yucca Mountain. The State ignores the fact, however, that no decision to use Yucca Mountain as a repository site has been made.[9]

The State also overlooks the fact that BLM has no role to play in deciding whether to use Yucca Mountain as a repository site. All those decisions

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[9] Equally unfounded is the State's suggestion that site characterization by itself causes the harm it fears. The premise of the allegation of harm is that the presence of massive quantities of radioactive waste in a repository will have adverse environmental effects and will be feared by the public. It is completely speculative to conclude that the conduct of site characterization activities, which do not involve the placement of waste at the site and which have virtually no impacts off the site itself, will induce the adverse effects imagined by the State.

will be made by the Department of Energy, the President, the Nuclear Regulatory Commission, and perhaps the Congress. As a result, the perceived harm that forms the basis for the State's allegation is not attributable to conduct of the sole defendant, the Bureau of Land Management. The lack of a properly pled allegation of injury to any quasi-sovereign interest is fatal to the claim of *parens patriae* standing.[10]

b. The court of appeals also concluded that a state may not bring a *parens patriae* action against a federal agency, Pet. App. 9, relying on *Alfred L. Snapp & Son* v. *Puerto Rico, supra.* In that case, this Court held that "a State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 607 n.14.[11] The Court quoted

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[10] Nevada also claims that it need only meet the Article III minimum for standing, injury-in-fact, and that the prudential limitations of the standing doctrine do not apply here. Pet. 36-45, 54-55. This contention hardly helps Nevada since the court of appeals held that its complaint failed to allege even the constitutional minimum of injury. The contention is erroneous in any event. Nevada's cause of action for review of the right-of-way is found in the Administrative Procedure Act, 5 U.S.C. 551, not the NWPA, and the zone of interests test is derived directly from the APA. See *Lujan* v. *National Wildlife Fed'n,* 110 S. Ct. 3177, 3186 (1990) ; *Data Processing Service Organizations* v. *Camp,* 397 U.S. 150, 153 (1970). Nevada relies, Pet. 45, on *Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 (1979), but in that case, the Court was construing Sections 810 and 812 of the Fair Housing Act of 1968, 42 U.S.C. 3610 and 3612, not the Administrative Procedure Act.

[11] Contrary to Nevada's assertion, Pet. 53-54, the four concurring Justices did not disagree with this part of the Court's opinion. The quotation from Justice Brennan's concurring opinion is not a reference to footnote 14, the concurring opinion does not even discuss this issue, and the concurring Jus-

from *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923): "it is no part of [a State's] duty or power to enforce [the citizens'] rights in respect of their relations with the federal government. In that field, it is the United States, and not the state, which represents them as *parens patriae*." 262 U.S. at 485-486. The judgment below is consistent with a number of other decisions denying *parens patriae* standing to state challenges to the administration of federal statutes. See *Iowa ex rel. Miller* v. *Block*, 771 F.2d 347, 354-355 (8th Cir. 1985) (challenge under Administrative Procedure Act to administration of disaster relief legislation), cert. denied, 478 U.S. 1012 (1986); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (court denied *parens patriae* standing, but found statutory standing to challenge orders under Natural Gas Act); *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 677-678 (D.C. Cir.) (challenge under Administrative Procedure Act to administration of disaster relief legislation), cert. denied, 429 U.S. 977 (1976); *Minnesota* v. *Benson*, 274 F.2d 764, 766 (D.C. Cir. 1960) (statutory challenge to a milk marketing order).[12]

In this Court, Nevada claims, Pet. 55-56, that its challenge falls within a qualification to this bar supposedly preserved in *Massachusetts* v. *Mellon*: "We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress." 262 U.S. at 485. The statute the State is

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tices expressly joined the opinion of the Court. 458 U.S. at 611-612.

[12] Although the Second Circuit in *Carey* v. *Klutznick*, 637 F.2d 834, 838 (1980), found *parens patriae* standing to challenge a census count, that case was decided before *Snapp*.

attacking as unconstitutional, however, is the NWPA; that law is being implemented by the Department of Energy, and not BLM. As we have shown, the challenge to the right-of-way is simply the wrong action against the wrong defendant for the litigation of this claim. For this reason, and in view of the complete failure of the complaint to plead any quasi-sovereign injury, this case is not an appropriate one in which to review the *parens patriae* capacity of a State to sue the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

GEORGE VAN CLEVE
Acting Assistant Attorney General

ANNE S. ALMY
JOHN A. BRYSON
Attorneys

THOMAS L. SANSONETTI
Solicitor

RICHARD J. WOODCOCK
Attorney
Department of the Interior

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